EDITOR'S NOTE

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No. 87-5565

IN THE SUPREME COURT OF THE UNITED STATES

TERM,

CHERLYN CLARK,

Petitioner

vs.

GENE JETER,

Respondent

PETITION FOR WRIT OF CERTIORARI FROM THE DECISION OF THE SUPERIOR COURT OF PENNSYLVANIA

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QUESTIONS PRESENTED

1. Does a six-year statute of limitations for actions brought to establish paternity in support actions for children born out of wedlock violate the equal protection guarantee of the Fourteenth Amendment of the United States Constitution?

2. Does foreclosing a child's continuing right to paternal support after six years deprive the child of the due process guaranteed by the Fourteenth Amendment of the United States Constitution?

3. Is Pennsylvania's current eighteen-year paternity statute of limitations, which has been construed to be not retroactive to cases pending on appeal or previously barred by the now repealed six-year statute, in conflict with the federal Child Support Enforcement Amendments?

*The caption of this case contains the names of all the parties to this action.

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IN THE SUPREME COURT OF THE UNITED STATES

TERM,

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vs.

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PETITION FOR WRIT OF CERTIORARI FROM THE DECISION OF THE SUPERIOR COURT OF PENNSYLVANIA

Petitioner, Cherlyn Clark, prays that a Writ of Certiorari issue to review the order of the Superior Court of Pennsylvania dated October 23, 1986.

OPINIONS BELOW

Cherlyn Clark's complaint for support for her out of wedlock child was dismissed by the Court of Common Pleas, Allegheny County, Pennsylvania on July 8, 1985. This unreported decision is attached as Appendix A. An appeal was taken to the Pennsylvania Superior Court, and the trial court's decision was affirmed by order and panel decision dated October 23, 1986, and reported at 358 Pa. Super. 550, 518 A.2d 276 (1986). A copy is attached as Appendix B. Thereafter the Superior Court denied Petitioner's

Application for Reargument, per curiam, on December 18, 1986 (attached as Appendix C). On May 27, 1987, the Pennsylvania Supreme Court denied her Petition for Allowance of Appeal, also per curiam, ____ Pa. ____, ____ A2d ____ (1987). A copy is attached as Appendix D.

JURISDICTIONAL STATEMENT

The Order of the Pennsylvania Supreme Court was dated and entered May 27, 1987. Petitioner moved this Honorable Court for an Extension of Time within which to file a Petition for Writ of Certiorari pursuant to 28 U.S.C. §2101(c). By order dated August 14, 1987, Justice William J. Brennan, Jr. granted Petitioner's motion and extended the filing date until September 24, 1987. This Petition for a Writ of Certiorari is filed within this period. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Section 1 of the Fourteenth Amendment to the United States Constitution provides that:

> ...nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.

The statutory provisions involved are

1. PA. CONS. STAT. ANN., Tit. 42 §6704(e) (Purdon 1982) (repealed 1985, Oct. 30, P.L. 264, No. 66 §3, effective in 90 days):

> (e) Limitation of actions. - All actions to establish the paternity of a child born out of wedlock brought under this section must be commenced within six years of the birth of the child, except where the reputed father shall have voluntarily contributed to the support of the child or shall have contributed to the support of the child or shall have acknowledged in writing his paternity, in which case an action may be commenced at any time within two years of any such contribution or acknowledgment by the reputed father.

2. PA. CONS. STAT. ANN. Tit. 23 §4343(b) (Purdon Supp. 1987) (1985, Oct. 30, P.L. 264, No. 66, §1, effective in 90 days):

> (b) Limitation of actions. - An action or proceeding to establish the paternity of a child born out of wedlock must be commenced within 18 years of the date of the birth of the child.

3. 42 U.S.C. §666(a) and §666(a)(5):

> 42 U.S.C. §666. Requirement of statutorily prescribed procedures to improve the effectiveness of child support enforcement

a) Types of procedures required:

In order to satisfy section 654(20)(A) of this title, each State must have in effect laws requiring the use of the following procedures, consistent with this section and with the regulations of the Secretary, to increase the effectiveness of the program which the State administers under this part:

...

(5) Procedures which permit the establishment of the paternity of any child at any time prior to such child's eighteenth birthday.

STATEMENT OF THE CASE

Cherlyn Clark and Gene Jeter began seeing each other socially in 1971. Tiffany Clark was born to Cherlyn on June 11, 1973. Gene Jeter made intermittent voluntary contributions to her support up until June 1981. In August 1983 Petitioner filed a support complaint against Gene Jeter. Blood tests ordered by the trial court thereafter revealed a 99.33% probability that Gene Jeter is Tiffany's father.

In the trial court Respondent Jeter raised the defense that Petitioner's claim should be time-barred by the six-year statue of limitations then in effect. Petitioner asserted that the statute was unconstitutional because it violated equal protection and due process. The trial court upheld the constitutionality of the statute based on the Pennsylvania Supreme Court's decision in Astemborski v. Susmarski, 499 Pa. 99, 451 A.2d 1012 (1982), cert. granted, order vacated and remanded, 103 S.Ct. 3105 (1983), order reinstated, 502 Pa. 409, 466 A.2d 1018 (1983), pages 2-3, Order of Judge Strassburger, Appendix A. The trial court therefore dismissed Petitioner's support complaint.

Petitioner then appealed to the Superior Court of Pennsylvania, arguing again that the six-year statute of limitations in paternity actions for purposes of support

violated equal protection and due process. In a carefully reasoned opinion, the Superior Court pointed up the many inconsistencies between the short statute of limitations in paternity/support actions and the unlimited right to establish support in other sorts of cases. The Court also expatiated on the inequities of barring a child's right to support because of the parent's failure to file a timely complaint. Nevertheless, the Superior Court found itself to be bound by Astemborski v. Susmarski, supra, and upheld the constitutionality of the six-year limit. (Opinion of Superior Court, p. 5, Appendix B)

While the case at bar was pending before the Superior Court, Pennsylvania enacted an eighteen-year statute of limitations as part of a package of support program reforms mandated by the federal Child Support Enforcement Amendments. Petitioner requested that the Superior Court remand her case to the trial court to determine whether the eighteen-year statute should be applied to her case. The Superior Court denied this request on the same day it issued its opinion (Appendix B) holding that the eighteen-year statute was not retroactive and could not revive cases which would have been barred by the six-year statute.

This decision was made without permitting Petitioner to brief the issue. Therefore Petitioner filed a Motion for Reargument in which she argued that the federal Child Support Amendments compelled a retroactive application of the eighteen-year statute. This motion was denied per curiam. (Appendix C)

Petitioner then filed a Petition for Allowance of Appeal with the Pennsylvania Supreme Court, arguing that the six-year statute offends equal protection and due process. She also argued the required retroactivity of the eighteen-year statute. The first question listed in the Statement of Questions Presented in her Petition for Allowance of Appeal was

> Should the new 18 year statute of limitations in paternity/support actions, 23 Pa. C.S. §4343(b), be applied retroactively to cases pending on appeal at the time of its enactment in light of the fact that Pennsylvania must comply with the federally mandated eighteen year retroactive support/paternity statute of limitations in order to receive federal monies for Pennsylvania support enforcement programs?

The Pennsylvania Supreme Court denied Cherlyn Clark's Petition for Allowance of Appeal, per curiam, on May 27, 1987. (Appendix D)

REASONS FOR GRANTING THE WRIT

I. Equal Protection

In recent years this Court has twice struck down state statutes of limitation imposed upon illegitimate children attempting to establish paternity as a prerequisite for obtaining support. Mills v. Habluetzel, 456 U.S. 91 (1982), invalidated a one-year statute of limitations on equal protection grounds, holding that one year was not long enough to provide adequate opportunity to file such a claim and that this time limit had no substantial relationship to the state's interest in preventing stale or fraudulent claims. The next year, a two-year statute of limitations for paternity/support actions was struck down for similar reasons in Pickett v. Brown, 462 U.S. 1 (1983).

After the Mills and Pickett decisions, the Supreme Court of Washington invalidated a six-year statute of limitations for paternity actions as a violation of equal protection while the high courts of Michigan and

Pennsylvania upheld their six-year statutes in spite of remands from this Court.[1] The Courts of Alabama and New York have divided over the propriety of five-year statutes.[2]

The next year this Court again noted probable jurisdiction to review the claim that Pennsylvania's six-year statute of limitations in paternity actions violates equal protection, in Paulussen v. Herion, 334 Pa. Super. 585, 483 A.2d 892 (1984); probable jurisdiction noted at 474 U.S. ___ (1985). Then, in October 1985, Pennsylvania enacted an eighteen year statute of limitations.[3] Therefore this Court vacated the judgment in

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1 See, State. ex rel. Adult and Family Services Division v. Bradley, 58 Or. App. 663, 650 P.2d 91, aff'd, 295 Or. 216, 666 P.2d 249 (1983); Daniel v. Collier, 113 Mich. App. 74, 317 N.W. 2d 293 (1982), vac. and remanded for consideration in light of Pickett v. Brown, 464 U.S. 805 (1983), on remand 130 Mich. App. 345, 343 N.W. 2d 16 (1983, released 1984); Astemborski v. Susmarski, 499 Pa. 99, 451 A.2d 1012, vac. and remanded for consideration in light of Pickett v. Brown, 462 U.S. 1127 (1983), on remand, 502 Pa. 409, 466 A.2d 1018 (1983).

2 Morgan County Dept. of Pensions ex rel. Ryan v. Kelso, 460 So. 2d 1333 (Ala. Civ. App. 1984); Patricia R. v. Peter W., 120 Misc. 2d 986, 466 N.Y.S. 2d 994 (1983).

3 Act No. 66 (October 30, 1985) 23 Pa. Cons. Stat. Ann. §4343(b) (Purdon Supp. 1987) provides as follows:

> §4343. Paternity.
>
> (b) Limitations of actions.--An action or proceeding under this chapter to establish the paternity of a child born out of wedlock must be commenced within 18 years of the date of birth of the child.

Paulussen and remanded for a determination of whether the eighteen-year statute would be applied to pending cases which had been barred under the six-year statute. Paulussen v. Herion, ___ U.S. ___, 106 S.Ct. 1339 (1986).

In the meantime, the instant case was heard and both issues raised by Paulussen were decided therein by the Superior Court of Pennsylvania. First, the Superior Court reluctantly held that the six-year statute of limitations was not unconstitutional based on Astemborski v. Susmarski, 499 Pa. 99, 451 A.2d 1072, on remand 502 Pa. 407, 466 A.2d 1018 (1983). The Court also found that the eighteen-year statute of limitations could not be applied retroactively to cases pending on appeal at the time of its enactment. Moreover, cases barred under the six-year statute could not be revived by refiling under the new eighteen-year statute. Clark v. Jeter, 358 Pa. Super. 550, 518 A.2d 276 (1986). Cherlyn Clark's petition for allowance of appeal was subsequently denied by the Pennsylvania Supreme Court, ____ Pa. ____, ____ A.2d ____ (1987).

As a result, the question of whether Pennsylvania's six-year statute of limitations violates equal protection is now ready for resolution. Otherwise,

by continued operation of this statute, Tiffany Clark and thousands like her will be forever barred from obtaining support from their natural fathers.

The statute under consideration provides as follows:

> (e) Limitation of actions. All actions to establish the paternity of a child born out of wedlock brought under this section must be commenced within six years of the birth of the child, except where the reputed father shall have voluntarily contributed to the support of the child or shall have acknowledged in writing his paternity, in which case an action may be commenced at any time within two years of any such contribution or acknowledgement by the reputed father.
>
> 42 Pa. Cons. Stat. Ann. §6704(e) (Purdon Supp. 1985)

As the Pennsylvania Superior Court concluded, this statute works a special hardship on out-of-wedlock children as compared with legitimate children:

> This action [for paternity] is included within the general provisions regarding support actions, and it applies only to an action to determine paternity brought pursuant to a support action. Therefore, it applies only to children born out of wedlock who must establish paternity prior to seeking support. It does not directly preclude all children from obtaining support after the six year period has run or after a putative father ceases to make voluntary support payments for two years, but only precludes children born out of wedlock from establishing paternity. However, because establishment of paternity is a prerequisite to a support order, the statute of limitations operates to deny children born out of wedlock the right to seek support long before they reach

> majority unless the child, through its guardian, has already had his paternity established.
>
> Clark v. Jeter, 358 Pa. Super. 550, 518 A.2d 276, 279 (1986)

Nevertheless, the Pennsylvania Superior Court found itself to be bound by the Pennsylvania Supreme Court's holding in Astemborski v. Susmarski, supra, that Section 6704(e) does not violate equal protection. An analysis of this Court's decisions, however, shows Astemborski to have been wrongly decided.

The equal protection analysis developed by Mills v. Habluetzel, supra, and followed by Pickett v. Brown, supra, to evaluate such statutes focused on two requirements. First, the period for obtaining support must be "sufficiently long to present a reasonable opportunity to assert such claims," Mills v. Habluetzel, supra, 456 U.S. at 97. The Mills decision suggested that "difficult personal, family, and financial circumstances that often surround the birth of a child out of wedlock," are reasons that a one-year period was too short to give adequate opportunity to mothers to file their claims. Justice O'Connor in her concurrence, which was joined by four other Members of the Court, suggested that other factors -- such as a continuing relationship between the parents or temporary support by the father -- might influence a mother not to file for support for a number of years. Therefore, "the risk that the child

will find himself without financial support from his natural father seems as likely throughout his minority as during the first year of life." (Justice O'Connor concurring), Mills v. Habluetzel, supra, 456 U.S. at 106.

To determine whether six years is sufficient time to permit suits to be brought, the Pennsylvania Supreme Court in Astemborski focused upon "birth-related encumbrances" which the court argued would be dissipated after the first several years, 466 A.2d at 1022. However, the problems cited by Justice O'Connor in Mills and reiterated by the Pickett court are more complex, long-lived sociol-economic problems which, as Justice O'Connor stated, "may continue years after the child is born." Mills v. Habluetzel, supra, 456 U.S. at 105 n.4.

The case at hand aptly illustrates this point. Long after the birth of Tiffany, Cherlyn Clark was too frightened of Defendant to acknowledge publicly that he was the father of her child. After her fear subsided, the Plaintiff's lack of education and general misapprehension of the legal system prevented her from finding out and understanding that filling out support assignment papers with the welfare department was not the same thing as filing a complaint for support. When she learned otherwise, the

statute of limitations had already run. Clearly, in such a situation the child's right is unfairly denied because of the mother's fear and lack of education.

The second prong of the Mills analysis requires that any time limitation placed on the opportunity to determine paternity to obtain support must be substantially related to the state's interest in litigating stale or fraudulent claims, 456 U.S. at 101-102. In both Justice O'Connor's concurrence in Mills and the unanimous decision in Pickett, inconsistencies between the limitation periods afforded to similar claims were found to thwart the states' arguments that the short paternity statutes of limitation were necessary to prevent stale claims.

Such is the case here. Pennsylvania has permitted the determination of paternity without time limit in other, non-support, actions. For instance, the intestacy law, 20 Pa. Cons. Ann. Stat. §2107(c)(3), (Purdon Supp. 1985) allows a court disposing of a decedent's estate to establish that a child born out of wedlock is the child of his father "if there is clear and convincing evidence that the man was the father of the child, which may include a prior court determination of paternity." There is no set number of years after which Pennsylvania considers the evidence too

stale or the likelihood of fraudulent claims too great to allow a court to determine parentage under this heirship statute.

Secondly, a father in Pennsylvania may obtain a judicial determination that he is a child's parent without any limit to the time in which he seeks this determination. In In Re Mengel, 287 Pa. Super. 186, 429 A.2d 1162 (1981), the Pennsylvania Superior Court determined that a person claiming to be a father could utilize the Declaratory Judgment Act to seek such a determination and could as part of this suit obtain blood tests under the Uniform Act on Blood Tests to Determine Paternity. In passing, the Mengel court additionally noted that the father could also raise the issue of paternity in a suit to obtain visitation rights or to amend the child's birth certificate,[4] 429 A.2d at 1167. Moreover, under the holding of Commonwealth v. Goldman, 199 Pa. Super. 224, 184 A.2d 351 (1962), a father

[4] In Commonwealth ex rel. Gonzales v. Andreas, 245 Pa. Super. 307, 369 A.2d 416 (1976), the Superior Court specifically criticized the Uniform Act on Blood Tests to Determine Paternity (28 Pa. Stat. §307) because it "does not make any provision for a particular prescriptive period in which a putative father denying paternity must commence suit," 369 A.2d at 419. When 28 Pa. Stat. §307 was refashioned at 42 Pa. Stat. §6131 et seq., it is notable that the legislature once again refused to set a limit on the period of time in which a court could order the blood tests to determine parentage.

has the right at any time to dispute parentage and to have the benefit of blood tests to do so, provided he is not barred by laches or estoppel.

There never has been any statute of limitations in Pennsylvania which pertains to these actions. Yet these actions necessarily involve and decide paternity questions which may possibly arise more than six years after the birth of the subject child. Just as in Mills and Pickett, this inconsistency undercuts the State's position that proof problems are too great to determine paternity more than six years after the birth of the child. No justification has been put forward for this inconsistent application, which could explain why the evidence is considered stale after six years in one case but not in another.

Finally, in upholding Section 6704(e) the Pennsylvania Supreme Court has ignored the great improvements in the accuracy of blood tests. Pennsylvania statute provides that blood tests can be conclusive as to paternity, 42 Pa. Cons. Stat. Ann. §6136 (exclusion only). In addition, Pennsylvania case law permits these tests to be used as some positive evidence of paternity, though not conclusive. Turek v. Hardy, 312 Pa. Super. 158, 458 A.2d 562 (1983).

In Pickett v. Brown, supra, this Court concluded:

> In Mills, the court rejected the argument that recent advances in blood testing negated the state's interest in avoiding the prosecution of stale or fraudulent paternity claims. 456 U.S. at 98, n. 4, 102 S.Ct. at 1554, n.4. It is not inconsistent with this view, however, to suggest that advances in blood testing render more attenuated the relationship between a statute of limitations and the State's interest in preventing the prosecution of stale or fraudulent paternity claims. This is an appropriate consideration in determining whether a period of limitations governing paternity actions brought on behalf of illegitimate children is substantially related to a legitimate state interest.
>
> Pickett v. Brown, supra, 462 U.S. at 17.

In sum, the State's position that Section 6704(e) bears a substantial relationship to the stated purpose of preventing stale or fraudulent claims is thoroughly undercut by the inconsistencies in permitting paternity determinations without time limits in non-support proceedings, while barring actions which come under Section 6704(e), and further diminished by the availability of highly accurate blood tests. Moreover, the State's important countervailing interest cited in the Mills concurrence and reiterated in Pickett of gaining support for children to keep them off the

welfare rolls further weakens the State's justification for upholding Section 6704(e) and therefore denying paternal support to many children.

In sum, the above considerations weigh heavily against the argument that Section 6704(e) has a substantial relation to a legitimate state interest of avoiding fraudulent or stale claims. The Clark court's holding that the statute does not violate equal protection should be reversed.

II. Due Process

In addition to its equal protection infirmity, Pennsylvania's six-year statute of limitations deprives minor children such as Tiffany Clark of their rights to seek and obtain the paternal financial support to which they are entitled without first affording them any of the due process protections mandated by the Fourteenth Amendment.

Pennsylvania's well-settled statutory and common law establishes that the minor children of Pennsylvania born both in and out of wedlock are owed an ongoing duty of support from their parents, throughout their minority, Conway v. Dana, 456 Pa. 536, 318 A.2d 324 (1974); Commonwealth v. Rebovich, 267 Pa. Super. 254, 406 A.2d 791 (1977). Despite the child's legal entitlement to receive this paternal financial support for eighteen years, however, 42 Pa. Cons. Stat. Ann. §6704(e) (Purdon Supp. 1985) provides that the legal action to obtain it from the father must be commenced within six years of the birth of the out of wedlock child, or within two years of the putative father's last voluntary support. Moreover, Pennsylvania law requires that such lawsuit must be initiated, not by the minor child, but by the person having custody of the child. 42 Pa. Cons. Stat. Ann. §6704(b) (Purdon Supp. 1985); Pa.R.Civ.P. 1910.3, 1910.4.

Thus, although a minor child born out of wedlock possesses an independent right to paternal support, the child's custodian possesses the exclusive control to exercise or not exercise the child's right to seek such support. Consequently, in cases such as that now before this Honorable Court, the custodial parent's failure to initiate a support action within the time prescribed by the challenged statute of limitations serves forever to foreclose the minor child's right to receive the support which her parent is legally obligated to provide.

The Pennsylvania Superior Court's rejection of the Petitioner's due process challenge to the constitutionality of 42 Pa. Cons. Stat. Ann. §6704(e) (Purdon Supp. 1985), conflicts with the conclusions of the courts of many other jurisdictions. Numerous states have recognized that a minor child's independent rights to obtain parental support may not, under the Due Process Clause, be constitutionally foreclosed by a statute of limitations which truncates the custodial parent's right to initiate such a support action on behalf of the child.

In some jurisdictions, the minor child has been held to possess a right of action separate from, and longer than, that afforded to the child's parents -- precisely to avoid the due process problems raised in the instant case. See Spada v. Pauley, 149 Mich. App. 196, 385 N.W.2d 746

(1986); Bertie-Hertford Child Support Agency ex rel. Souza, (Court of Appeals, N.C.) 342 S.E.2d 579 (1986); Payne v. Prince George's County Dept. of Social Services 67 Md. Ap. 327, 507 A.2d 641 (1986); Nettles v. Beckley, 32 Wash. App. 606, 648 P.2d 508 (1982); Stringer v. Dudoich, 92 N.M. 98, 583 P.2d 462 (1978); Kaur v. Singh Chawla, 11 Wash. App. 362, 522 P.2d 1198 (1974); Huss v. DeMott, 215 Kan. 450, 524 P.2d 743 (1974).

In other jurisdictions, shorter statutes of limitations have been upheld because they barred only the rights of the adult--not the rights of the minor child--to file suit beyond the statutory limit. See, Doak v. Milbauer, 216 Neb. 331, 343 N.W.2d 751 (1984); Huss v. DeMott, supra., 524 P.2d at 746:

> We do not think the legislature should be regarded as intending to relieve the father from this obligation to the child by the enactment of the statute above referred to, which authorizes the mother of an illegitimate child if she sees fit, to maintain an action for her benefit in the name of the state against the putative father, and provides for the enforcement of a judgment by imprisonment ... It would obviously be inadequate to cover the entire field of paternal liability, since the mother might not care to institute such a proceeding, or might die without instituting it. The measure is one providing machinery for the enforcement of a duty already existing rather than one creating a new obligation. Parental liability for the support of legitimate children did not

> originate with the statute [of limitations] imposing punishment for a default in that respect.

Cf., Ortega v. Portales, 134 Colo. 537, 307 P.2d 196 (1957).

In finding a paternity statute of limitations unconstitutional as violative of a minor child's right to due process, the Texas Court of Civil Appeals stated:

> To hold otherwise would allow the illegitimate's rights to be waived by the mother. Not only would this result in unequal protection under the law...but such a denial would violate the illegitimate's constitutional rights to due process... The law does not permit one to forfeit another's rights. The right to an illegitimate child to assert a claim for paternal support is too fundamental to permit its forfeiture by the mother's failure to timely institute a filiation proceeding.
>
> In Re: Miller, 605 S.W.2d 332 (Tx. Civ. App. 1980), at 336 (emphasis added).

Clearly, Pennsylvania's judicial ratification of the challenged statute of limitations on due process grounds contrasts starkly with the prevailing analyses and holdings of numerous other state courts.

Consequently, the Petitioner respectfully requests this Honorable Court now to consider the due process challenge raised in the instant case, in light of the important and fundamental right involved, and the conflicting case law of other jurisdictions herein cited.

III. Conflict with Federal Statute

The Pennsylvania Superior Court has decided as a matter of first impression that Pennsylvania's newly enacted eighteen-year statute of limitations in paternity/support actions is not retroactive and cannot be applied to revive cases barred under the six-year statute. Pennsylvania's eighteen-year statute thus construed by the Superior Court is in direct conflict with the controlling federal statute.

In 1984 Congress unanimously passed the Child Support Enforcement Amendments of 1984, P.L. 98-378, codified at 42 U.S.C. §§651, et seq. These Amendments require states participating in the Program for Aid to Families of Dependent Children (AFDC), Title IV, Part A of the Social Security Act, 42 U.S.C. §602-615 (1982) to adopt certain procedures to strengthen and streamline support collection efforts.

The eighteen-year statute of limitations in support/paternity actions was a keystone of this program and each state was required to adopt it in order to share in the federal funding for state support programs:

> 42 U.S.C. §666. Requirement of statutorily prescribed procedures to improve the effectiveness of child support enforcement

a) Types of procedures required:

> In order to satisfy section 654(20)(A) of this title, each State must have in effect laws requiring the use of the following procedures, consistent with this section and with the regulations of the Secretary, to increase the effectiveness of the program which the State administers under this part:
>
> ...
>
> (5) Procedures which permit the establishment of the paternity of any child at any time prior to such child's eighteenth birthday. (emphasis added)

In his remarks upon the passage of the Child Support Enforcement Amendments, Senator Robert Dole presented the following stark statistics:

> "According to the U.S. Census Bureau, more than 8.4 million women in 1981 were raising children whose fathers were absent; 30 percent of these women and children were living in poverty. Although most of the women should receive child support payments, obligations have been established on behalf of only 4 million of them.
>
> 130 Cong. Record S-4802, April 25, 1984

These figures were reiterated in the comments of other Senators and Representatives. The clear Congressional concern here was for the women and children who in the past had not received support. The Amendments were passed so that in the future these women and children would be deprived of support no longer.

The Pennsylvania Legislature enacted its eighteen-year state of limitations, 23 Pa. Cons. Stat. Ann. §4343(b) (Purdon Supp. 1987) while Cherlyn Clark's case was pending before the Superior Court. It provides:

> Limitations of Actions. -- An action or proceeding under this chapter to establish the paternity of a child born out of wedlock must be commenced within 18 years of the date of birth of the child.

Section 4343(b) was part of a package of support program reforms passed to bring Pennsylvania into compliance with the federal Amendments and thereby prevent Pennsylvania from losing federal reimbursement funds provided for the support programs. Thus, a prepared statement by Pennsylvania State Senator Greenleaf which was read into the record at the time the legislature approved Act 66 emphasized that the Act had been passed for "federal money and to better provide for our families." Pennsylvania Legislature Journal-Senate, October 9, 1985, at 1099.

The federal government is free to establish conditions for participation in federally funded programs, King v. Smith, 392 U.S. 309 (1968). In other cases brought under the Social Security Act this Court has held that once a state voluntarily chooses to participate in a program under that Act, the State must comply with the

federal statutory requirements and applicable regulations. See, Alexander v. Choate, 469 U.S. 287, 105 S.Ct. 712, 715 (1985); Harris v. McKae, 448 U.S. 297, 301 (1980).

The plain language, accompanying regulations, and legislative history of Section 466(a)(5) of the Child Support Enforcement Amendments of 1984 require that states adopt, at minimum, retroactive eighteen-year statutes of limitation for paternity actions. The statutory language is clear: any child at any time until his eighteenth birthday must be able to have his paternity established.

The House of Representatives, in approving the Amendments, specifically stated:

> The bill provides that procedures under applicable state paternity laws must permit the establishment of an individual's paternity for any child until the child's eighteenth birthday... States could eliminate statutes of limitation for establishing paternity altogether if they wished. H.S. Rep. No. 527, at 38.(1983).

The Congressional intent to use this requirement to revive cases which might have been barred by shorter statutes in the various states was made clear by the regulations implementing the Child Support Enforcement Amendments on May 9, 1985. In addressing comments that the regulations gave insufficient attention to existing state

laws and procedures for the establishment of paternity, the Department of Health and Human Services (HHS) took the following position:

> Since it is clear that cases previously considered closed because of the child's age will now have to be reopened and services provided, we saw no need to elaborate on this requirement. Child Support Enforcement Program, Implementation of Child Enforcement Amendments of 1984, 50 Fed. Reg. 90, 19608, 19631 (1985), comment to 45 C.F.R. §302.70(a)(5)

HHS' position on this issue is entitled to substantial deference. See, e.g. Connecticut Dept. of Income Maintenance v. Heckler, 471 U.S. 524, 105 S.Ct. 2210, 2214 (1985). Moreover HHS' position is the only reasonable interpretation of the plain language of the Act and legislative history.

Cherlyn Clark and her daughter were among the 4.4 million women and children living without needed support in 1981, whom Congress clearly intended to help by the enactment of the Child Support Enforcement Amendments. Yet by operation of Pennsylvania law, the Amendments will do them no good. Section 4343(b) as construed by the Pennsylvania Superior Court is in direct conflict with the intent and language of the Child Support Enforcement Amendments.

CONCLUSION

For these reasons, the Petitioner respectfully requests this Honorable Court to issue a Writ of Certiorari to review the Decision and Order of the Superior Court of Pennsylvania.

CERTIFICATION IN ACCORDANCE WITH SUPREME COURT RULE 28.4(c)

Because the constitutionality of a state statute is drawn into question, 28 U.S.C. §2403(b) may be applicable.

Respectfully submitted:

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IN THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY, PENNSYLVANIA

CHERLYN CLARK,
Plaintiff

v.

GENE JETER,
Defendant

FAMILY DIVISION
No. FD83-6955
Code _____

OPINION & ORDER OF COURT
JUDGE GENE STRASSBURGER

Counsel for Plaintiff:
Evalynn B. Welling, Esq.

Counsel for Defendant:
Craig A. McClean, Esq.

APPENDIX A

CHERLYN CLARK,)
)
Plaintiff)
)
v.) No. FD83-6955
)
GENE JETER,)
)
Defendant)

O P I N I O N

STRASSBURGER, J.

Plaintiff, Cherlyn Clark [Clark] brought this action seeking child support for her daughter, Tiffany Clark [Tiffany] against Defendant, Gene Jeter [Jeter].

To summarize, in 1971, Clark and Jeter began seeing each other. In September, 1972, Clark discovered she was pregnant and informed Jeter that he was the father. According to Clark, Jeter did not want this child and acted abusively towards her. According to Jeter, he denied that the child was his and engaged with Clark in a heated argument. The relationship between the parties thereafter ceased.

On June 11, 1973, Tiffany was born. One David Green was listed on the birth certificate as the child's father. The same name was given to the Pennsylvania Department of Public Welfare [DPW] when Clark applied for welfare in 1973. In August, 1974 Clark informed DPW that Green was in fact a fictitious name and that the real father was Jeter. Several documents were completed at that time including: an Application for Child Support Services; Authorization to Change Beneficiary and the Pay Order and Arrearages to Commonwealth of Pennsylvania, Department of Public Welfare; Notice of Support Referral; and Child Support Action Notice. However, no support complaint was filed against Jeter until September 22, 1983. Jeter filed an answer and new matter to the complaint which denied paternity and raised the statute of limitations. At 42 Pa. C.S.A. §6704, the statute provides:

> "(b) Limitation of actions -- All actions or proceedings to establish the paternity of a child born out of wedlock brought under this section must be commenced within six years of the birth of the child, except where the reputed father shall have voluntarily contributed to the support of the child or shall have acknowledged in writing his paternity, in which case an action or proceeding may be commenced at any time within two years of any such contribution or acknowledgment by the reputed father."

Although Clark concedes that the action was commenced neither within six years of the child's birth nor within two years of the last reported "support" contribution, she argues that the statute of limitations is unconstitutional in that it treats illegitimate children differently than legitimate children.

However, such an argument cannot prevail in light of Astemborski v. Susmarski, 499 Pa. 99, 451 A.2d 1012 (1982), cert. granted, order vacated and remanded, 103 S.Ct. 3105 (1983), order reinstated, 502 Pa. 409, 466 A.2d 1018 (1983), which upheld the statute in the following words, after the same equal protection challenge:

> "Since the statute is substantially related to a legitimate state interest, viz., the prevention of stale or fraudulent paternity claims, it is not constitutionally infirm under a Fourteenth Amendment challenge even though the statute may operate, as it has in this case, to deprive an illegitimate child of its right to make a claim for support beyond the six year limit."
> 466 A.2d at 1022

As alternative arguments, Clark contends that the statute of limitations should be tolled and/or that Jeter should be estopped to assert the statute due to threats made and duress exercised upon Clark. However, Clark's testimony indicates that any fear she may have had of Jeter, even if sufficient to toll the statute, lasted only a few years after the 1972 incident. There were at least six years after that period during which an action could have been filed.

Based on the facts and applicable law, this court finds that Clark's claim is barred by the statute of limitations. An order in accord with this opinion shall be entered.

STRASSBURGER, J.

July 8, 1985

CHERLYN CLARK,
Plaintiff

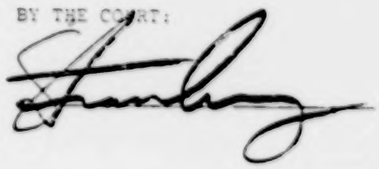
v. No. FD83-6935

GENE JETER,
Defendant

ORDER OF COURT

AND NOW, this 8th day of July, 1985, in accordance with the foregoing opinion, it is hereby ORDERED, ADJUDGED and DECREED that Plaintiff's complaint for support be and the same is dismissed.

BY THE COURT:



J.

SUPERIOR COURT OF PENNSYLVANIA

PITTSBURGH DISTRICT

CHERLYN CLARK,
Appellant

v.

GENE JETER

NO. 1040 Pittsburgh 1985

ORDER

AND NOW, this 23rd day of OCTOBER , 1986, it is ordered as follows:

X Order affirmed.

_____ Order reversed.

_____ Judgment affirmed.

_____ Judgment of Sentence affirmed.

_____ Judgment of Sentence reversed.

_____ Order vacated and lower court directed to proceed in accordance with opinion filed herewith.

_____ Order modified as set forth in opinion filed herewith.

_____ Costs to be taxed as provided by Chapter 27 of the Pa.R.A.P.

_____ Costs to be taxed as provided in opinion filed herewith.

_____ Appeal quashed.

BY THE COURT

Eleanor R Valecko
DEPUTY PROTHONOTARY

APPENDIX B

J. 14060/86

CHERLYN CLARK, Appellant : IN THE SUPERIOR COURT OF PENNSYLVANIA

v. :

GENE JETER : No. 1040 Pittsburgh, 1985

Appeal from the order of the Court of Common Pleas, Family Division, of Allegheny County, Family No. 83-6955.

BEFORE: ROWLEY, WIEAND, and DEL SOLE, JJ.

OPINION OF THE COURT

BY ROWLEY, J.: FILED: OCTOBER 23, 1986

This is an appeal from an order dismissing appellant's complaint for support. Appellant, the natural mother of a child born on June 11, 1973, filed a support action on behalf of the child against appellee, the putative father of the child, in August, 1983, approximately two years and two months after appellee had last provided financial support for the child. Appellee filed an answer and new matter denying paternity and raising the six-year statute of limitations, 42 Pa.C.S. §6704, as a defense. The trial court dismissed the petition because it was barred by the statute of limitations, because case law had held the statute to be constitutional, and because appellee engaged in no activity justifying the tolling of the statute of limitations.

Appellant has appealed from the order dismissing the action and argues: 1) that the trial court erred in concluding that the six year statute of limitations for support/paternity actions brought on behalf of children born out of wedlock does not violate the equal protection and due process clauses of the United States Constitution;[1] and 2) that the trial court erred in refusing to toll the statute of limitations based on appellee's abusive conduct towards appellant.

Following the filing of the appeal, the legislature enacted a new statute of limitations applicable to determinations of paternity relative to an action for support as follows:

> §4343. Paternity.
>
> (b) Limitations of actions.--An action or proceeding under this chapter to establish the paternity of a child born out of wedlock must be commenced within 18 years of the date of birth of the child.

Act of October 30, 1985, P.L. 66, Subchapter C §4343(b) [to be codified at 23 Pa.C.S. §4343(b)]. Appellant petitioned the Superior Court to remand the case to the trial court prior to the Superior Court's disposition of the aforementioned issues so that the trial court could decide the issue of the retroactivity of the new statute, for if the new statute is to be given retroactive application, then the arguments raised on appeal are moot. Appellant's petition to remand was denied. However, we will address the issue of whether the 18 year statute of limitations should be given retroactive effect.

I.

A.

The Statutory Construction Act of 1972, 1 Pa.C.S. §1926, provides, "No statute shall be construed to be retroactive unless clearly and manifestly so intended by the General Assembly." The new 18 year statute of limitations itself makes no provision for retroactive application, but provides only that the act shall take effect in 90 days. 1985 Pa. Legislative Service #4, P.L. 66, §4 p. 106. However, when the legislature wants to make a statute retroactive, it clearly and unambiguously does so. For example, when the legislature amended the act providing for Commonwealth Court jurisdiction, it included a clause stating that the act "shall take effect immediately and shall be retroactive to December 5, 1980."

Section 404(1) of Act 1982, December 20, P.L. 1409, No. 326. Not only does the 18 year statute of limitations for paternity/support actions not include language suggesting that it was intended to be applied retroactively, but there is no legislative history to support retroactive application of the act. Therefore, we hold that the 18 year statute of limitations for paternity/support actions is not to be applied retroactively.

We find support for our conclusion in Maycock v. Gravely Corporation, ___ Pa. Super. ___, 508 A.2d 330 (1986). In Maycock, 42 Pa.C.S. §5533, which tolls the running of the statute of limitations for civil actions during minority, was held not to apply retroactively to a claim which had been barred under the previous statute of limitations in the absence of a clear intention of the legislature for the act to be retroactive. Although not identical to the new paternity/support statute of limitations, the statute of limitations involved in Maycock is similar in several material respects for determining retroactivity. Both statutes greatly expand the period during which a minor's cause of action can be brought; both conspicuously lack any indication that the legislature intended for them to be applied retroactively; and both provide a prospective effective date only. Therefore, just as the statute of limitations in Maycock is not retroactive, so too is the paternity/support statute of limitations not retroactive.

B.

Even if the statute were to be given retroactive effect, however, it could not revive appellant's cause of action and her complaint would still be time barred. Several courts of this Commonwealth have held that a retroactive statute of limitations can

apply only to actions which have not been concluded or barred under the former statute. Upper Montgomery Joint Authority v. Yerk, 1 Pa. Cmwlth. 269, 274 A.2d 212 (1971). If the right to sue under the prior statute of limitations has not expired, then the new statute of limitations can be applied retroactively. In re Condemnation of Real Estate by Carmichaels, 88 Pa. Cmwlth. 541, 490 A.2d 30 (1985), interpreting Seneca v. Yale and Towne Manufacturing Co., 142 Pa. Super. 470, 16 A.2d 754 (1940). However, once the right to sue has expired, no subsequent legislation can revive it. Overmillar v. D.E. Horn and Co., 191 Pa. Super. 562, 159 A.2d 245 (1960).

In the instant case, the child was born in 1973, and the last voluntary support payment for the child from appellee was made in June, 1981, two years and two months prior to the filing of the complaint for support in August, 1983. The statute of limitations applicable when the Complaint was filed required the action to be commenced within six years of the birth of the child or within two years of the last written admission of paternity or voluntary payment of support. 42 Pa.C.S. §6704(e). Thus appellant's cause of action expired in June 1983 when the child was ten years old and two years after appellee's last voluntary support payment. The new 18 year statute of limitations became effective in January, 1986, some two and one-half years after appellant's cause of action expired. Therefore, even retroactive application of the new 18 year statute of limitations would not affect appellant's rights.

II.

Having determined that the new statute of limitations should not be applied retroactively and that even if it were applied retroactively, it would not remove the time bar on appellant's

action, we now address the arguments raised by appellant as to why the six year statute of limitations should not be applied.

> The six year statute of limitations provides:
>
> (e) Limitation of actions.-All actions to establish the paternity of a child born out of wedlock brought under this section must be commenced within six years of the birth of the child, except where the reputed father shall have voluntarily contributed to the support of the child or shall have acknowledged in writing his paternity, in which case an action may be commenced at any time within two years of any such contribution or acknowledgement by the reputed father.

42 Pa.C.S. §6704(e). This act is included within the general provisions regarding support actions, and it applies only to an action to determine paternity brought pursuant to a support action. Therefore, it applies only to children born out of wedlock who must establish paternity prior to seeking support. It does not directly preclude all children from obtaining support after the six year period has run or after a putative father ceases to make voluntary support payments for two years, but only precludes children born out of wedlock from establishing paternity. However, because establishment of paternity is a prerequisite to a support order, the statute of limitations operates to deny children born out of wedlock the right to seek support long before they reach majority unless the child, through his guardian, has already had his paternity established.

Appellant argues that the six year statute of limitations deprives a child born out of wedlock the equal protection of the laws and therefore is unconstitutional. In Mills v. Habluetzel, 456 U.S. 91, 102 S.Ct. 1549, 71 L.Ed. 2d 770 (1982), the Supreme Court held that the period during which support suits can be brought on behalf of illegitimate children must be sufficiently long to allow a reasonable opportunity for the claim to be brought and the limitatio

on such suits must be substantially related to the state's interest in avoiding the initiation of stale claims. In Mills, the court found a one year statute of limitations to deny equal protection; in Pickett v. Brown, 462 U.S. 1, 103 S.Ct. 2199, 76 L.Ed. 2d 372 (1983), the court similarly found that a two year statute of limitations was unconstitutional. In Astemborski v. Susmarski, 502 Pa. 409, 466 A.2d 1018 (1983) the Pennsylania Supreme Court held that in light of Mills and Pickett, the Pennsylvania six year statute of limitations on paternity/support actions for children born out of wedlock did not deny equal protection because six years provided ample opportunity for a support action to be brought after birth-related financial and emotional problems had subsided and because the state's interest in avoiding claims of paternity where the proof of paternity had become stale was substantially related to the six year statute of limitations.

Appellant recognizes that the Pennsylvania Supreme Court has held that the statute does not deny equal protection based upon Mills and Pickett. Appellant also recognizes that the Superior Court cannot overrule a decision of the Pennsylvania Supreme Court. Commonwealth v. Edrington, 317 Pa. Super. 545, 464 A.2d 456 (1983). However, appellant suggests that we should "carefully scrutinize the logic" utilized in Astemborski to uphold the statute.

Appellant argues that a six year statute of limitations in paternity actions is not substantially related to the state's purported interest in precluding paternity actions in which the proof is stale. If the state had a legitimate and substantial interest in precluding paternity claims where the proof other than blood tests was non-existent or dimmed by the passage of time, then, appellant argues, the state would consistently place time limitations on all

paternity determinations. However, the state has not done this. For example, the Probate, Estates and Fiduciaries Code includes no limitations on the time in which a child must establish paternity in order to inherit from the putative father. 20 Pa.C.S. 2107(c)(3). Thus, the state does not have a legitimate and substantial interest in limiting the time in which paternity actions for support must be brought, and the Pennsylvania statute does not satisfy the second requirement of Mills.

Further authority for this position is found in State ex rel Adult and Family Services v. Bradley, 295 Or. 216, 666 P.2d 249 (1983). In this case, the Supreme Court of Oregon held unconstitutional on equal protection grounds a six year statute of limitations on paternity actions for out-of-wedlock children. The court stated that the equal protection clause requires at a minimum that states refrain from totally precluding illegitimate children from exercising their rights for reasons of proof problems alone. Jimenez v. Weinberger, 417 U.S. 628, 94 S.Ct. 2496, 41 L.E.2d 363 (1974); Mathews v. Lucas, 427 U.S. 495, 96 S.Ct. 2755, 49 L.Ed.2d 651 (1976); see also Bradley, Id., at 253, n. 12. Therefore, any restraints on the rights of children born out of wedlock to establish paternity must relate specifically to problems of proof in establishing paternity. The court examined the Oregon statutes and found that the proof problem had been addressed by the provisions regarding the use of blood tests (O.R.S. 109.258) and by the requirement of evidence of paternity corroborating the mother's testimony. (O.R.S. 109.145). The court stated that "although proof of paternity in some cases may become difficult with the passage of time, that possibility does not condone the total preclusion of illegitimate children beyond a certain age from attempting to [illegible] father's identity." Bradley, Id., at 254. Thus the

court held that the six year statute of limitations denied equal protection, especially where a child could bring a paternity action up to ten years after the death of a parent to determine his right to inherit from the deceased putative father.

In Asterborski, the Pennsylvania Supreme Court did not consider that proof of paternity problems have been addressed by other Pennsylvania statutes such as 42 Pa.C.S. §6136 which provides that blood tests can be conclusive as to paternity,[2] nor that the legislature has already expressed a lack of state interest in proof problems in paternity actions by placing no limitation on when a child must establish paternity in order to inherit by intestate succession. Similarly the court did not address the seeming inconsistency of limiting out of wedlock children's rights to support by allowing them to establish paternity only within six years of the date of birth or within two years of the last voluntary support payment, but to place no limitation on the putative parent's right to establish paternity at any time and thereafter seek enforcement of his parental rights. See: In re Mengel, 287 Pa. Super. 186, 429 A.2d 1162 (1981) (unwed putative father has standing to estabish paternity through a petition for declaratory judgment.) Despite the logic of these considerations and their acceptance in developing case law, the Pennsylvania Supreme Court has thus far remained steadfast in its holding that the six year statute of limitations is constitutional. As an intermediate appellate court, we are bound by the decisions of the Supreme Court. Therefore, we hold that the six year statute of limitations, 42 Pa.C.S. §6704(e), does not deny equal protection.

III.

Appellant also argues that the six year statute of limitations denies due process of law. Even though a child has a right to support throughout his minority, a child born out of wedlock can only sue to receive the support to which he is entitled by bringing an action within six years of birth or two years of the putative father's last voluntary support. Moreover, the statute, which limits when the action must be brought, requires that the complaint for support of a minor child be brought by the person having custody of the child. 20 Pa.C.S. §6704(b). Thus, although it is the child's right to support, the child's custodian has exclusive control to exercise or not to exercise the child's right. By failing to commence an action for the child's support within the statute of limitations, the custodian can forfeit the child's right to ever receive support from the putative father. Therefore, appellant argues, the child is denied due process.

In some jurisdictions which have considered the due process argument against paternity statutes of limitations, the controlling issue has been whether the statute precludes the child's only avenue for enforcement of the parent's obligation for support. In some jurisdictions, the statutory procedure for obtaining support, to which the statute of limitations applies, is not the exclusive means of establishing paternity and support. Kaur v. Singh Chawla, 11 Wash. App. 362, 522 P.2d 1198 (1974) (to keep the statute of limitations from being declared unconstitutional, the court held that the statutory filiation procedures were not the exclusive means of securing the child's right to support); Huss v. DeMott, 215 Kan. 456, 524 P.2d 743 (1974) (a child has a common law cause of action separate from the statutory bastardy proceedings). And in some jurisdictions, the statute of limitations has been interpreted as

applying only to the mother or guardian's right and not to the child's right. Doak v. Milbaurer, 216 Neb. 331, 343 N.W.2d 751 (1984); Huss v. DeMott, 215 Kan. 450, 524 P.2d 743 (1974).

The only procedure for bringing a paternity and support action in Pennsylvania is pursuant to the support statute. 42 Pa.C.S. §6701 et seq. Yet under this statute, the child's custodian must bring the action and must do so while the child is still a minor. If the person who has custody of the child fails to file a complaint for support/paternity before the child is six years old, the child is foreclosed from seeking and obtaining support throughout the remainder of his minority even though, in theory, he has the right to support until he reaches majority.

It is the settled rule in Pennsylvania, "that it is not violative of any constitutional rights to hold minors bound equally with adults to the prescribed statutory periods within which legal causes of action may be brought." Petri v. Smith, 307 Pa. Super. 261, 453 A.2d 342 (1982); Von Colln v. Pennsylvania Railroad Co., 367 Pa. 232, 80 A.2d 83 (1951). In DeSantis v. Yaw, 290 Pa. Super. 535, 434 A.2d 1273 (1981) a panel of the Superior Court seriously questioned the continuing validity of the Supreme Court's rule stating: "a chose in action is a form of personal property that without question now belongs to the injured child himself, and yet he is legally debarred from pursuing his claim." Id., at 542, 434 A.2d at 1276. The Supreme Court has not re-addressed the issue of whether children who are held to be equally bound to statutes of limitations with adults are denied due process, and the Superior Court has been compelled to continue to follow the long-established rule. Stein v.

The Washington Hospital, 302 Pa. Super. 124, 448 A.2d 558 (1982). Until the Supreme Court changes its rule, we are bound to follow it. Therefore, we hold that the six year statute of limitations, 42 Pa.C.S. §6704(e), does not deny due process.

IV.

Appellant's final argument is that appellee should be equitably estopped from raising the statute of limitations as a defense because of his conduct towards her. Appellant avers that when she told appellee that she was pregnant with his child, he physically abused her and threatened her in order to prevent her from listing him as the child's father on the birth certificate. As found by the trial court, however, even if appellee did threaten and abuse appellant, this behavior lasted only a few years after 1972, and there were at least six years in which to have commenced the action after the abuse ceased. Therefore, we find no merit to this argument.

Order affirmed.

---

1. Appellant has provided no notice to the Attorney General of her constitutional challenge to the statute in violation of Pa.R.C.P. 235 and Pa.R.A.P. 512.

2. Case law holds that blood tests are admissible as some evidence of paternity but are not conclusive. Olson v. Dietz, ___ Pa. Super. ___, 500 A.2d 125 (1985); Connell v. Connell, 329 Pa. Super. 1, 477 A.2d 872 (1984); Turek v. Hardy, 312 Pa. Super. 158, 458 A.2d 562 (1983).

The Superior Court of Pennsylvania
Sitting at Pittsburgh

DAVID A. SZEWCZAK
PROTHONOTARY
ELEANOR R. VALECKO
DEPUTY PROTHONOTARY

1015 GRANT BUILDING
PITTSBURGH, PA
15219
(412) 565-7592

December 18, 1986

Evalynn B. Welling, Esquire
Eileen D. Yacknin, Esquire
Neighborhood Legal Services
1312 East Carson Street
Pittsburgh, PA 15203

In Re: Clark v. Jeter
No. 1040 Pittsburgh, 1986

Dear Ms. Welling & Ms. Yacknin:

The Court has entered the following Order on your Application For Reargument in the above-captioned matter:

"ORDER OF COURT

AND NOW, this 18th day of December, 1986, Appellant's Application for Reargument is denied.

Per Curiam"

Very truly yours,

Eleanor R. Valecko

DEPUTY PROTHONOTARY

ERV:bbc

cc: Craig A. McLean, Esquire
Honorable Eugene B. Strassburger, III

APPENDIX C

The Supreme Court of Pennsylvania
Western District

PROTHONOTARY
IRMA T. GARDNER
DEPUTY PROTHONOTARY

801 City-County Building
Pittsburgh, PA
15219
(412) 565-2816

May 27, 1987

Evalynn B. Welling, Esquire
Eileen D. Yacknin, Esquire
Neighborhood Legal Services
1312 E. Carson St.
Pittsburgh, Pa. 15203

In Re: Cherlyn Clark v. Gene Jeter
No. 43 W. D. Allocatur Docket 1987

Dear Mses. Welling and Yacknin:

The Court has entered the following Order on your Petition for Allowance of Appeal in the above matter:

"May 27, 1987
Petition Denied.
Per Curiam"

Very truly yours,

Irma T. Gardner

DEPUTY PROTHONOTARY

ITG:cho
cc: Craig McKlean, Esq.
Hon. Leroy S. Zimmerman
Rose Palmer-Phelps, Director
Hon. Eugene Strassburger

APPENDIX D

No. 87-5565

IN THE SUPREME COURT OF THE UNITED STATES
TERM,

CHERLYN CLARK,

Petitioner

vs.

GENE JETER,

Respondent

ON WRIT OF CERTIORARI FROM THE DECISION
OF THE SUPERIOR COURT OF PENNSYLVANIA

CERTIFICATE OF SERVICE

I, Eileen D. Yacknin, hereby certify that, on the date designated below, I served a Petition for a Writ of Certiorari in the above-captioned case onto the Respondent and, pursuant to Supreme Court Rule 28.4(c), onto the Attorney General of Pennsylvania, by mailing one copy of the same (pursuant to Supreme Court Rule 28.3) to the following persons at the following locations, by first class mail, postage prepaid:

Counsel of Record for Respondent:

Attorney Craig McClean
1111 Manor Building
Pittsburgh, PA 15219

Attorney General of the
Commonwealth of Pennsylvania

Attorney Leroy Zimmerman
1545 Strawberry Square
Harrisburg, PA 17120

Dated: September 24, 1987

Eileen D. Yacknin
Counsel for Petitioner

OPPOSITION

BRIEF

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

NO. 87-5565

CHERLYN CLARK,
Petitioner
v.
GENE JETER,
Respondent

RESPONDENT'S BRIEF IN OPPOSITION TO A PETITION FOR WRIT OF CERTIORARI FROM THE DECISION OF THE SUPERIOR COURT OF PENNSYLVANIA

WENDELL G. FREELAND,
Counsel of record
CRAIG A. McCLEAN
Freeland and Kronz
1111 Manor Building
Pittsburgh, Pennsylvania 15219

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TABLE OF AUTHORITIES

REGULATIONS

QUESTIONS PRESENTED

1. Should This Court grant certiorari in a case of no precedential value where Petitioner's action had been time-barred under either the now repealed six-year statute of limitations or the subsequent eighteen-year statute of limitations retroactively applied?

2. Should This Court grant certiorari where petitioner is questioning the constitutionality of a defunct and repealed statute which had properly been determined by the highest court of the Commonwealth of Pennsylvania to not be violative of the equal protection and due process guarantees of the Fourteenth Amendment of the United States Constitution?

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

CHERLYN CLARK,

Petitioner

vs. No. 87-5565

GENE JETER,

Respondent

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI FROM THE DECISION OF THE SUPERIOR COURT OF PENNSYLVANIA

Respondent, Gene Jeter, prays that Petitioner's request for a Writ of Certiorari be denied.

COUNTER STATEMENT OF THE CASE

Tiffany Clark was born to Cherlyn Clark on or about June 11, 1973. David Green, and not Gene Jeter, was listed by Cherlyn Clark as the father on the baby's birth certificate. Ten years

and two months later, in August of 1983, Cherlyn Clark filed a support action against Gene Jeter, alleging him to be the father of Tiffany Clark. Gene Jeter denied that he is the father; and, in defense, further asserted the applicable statute of limitations. The child is now 14 years old.

Despite petitioner's recitations to the contrary, there are no blood test results in the record and the trial court did not find that Gene Jeter had supported the subject child.

The Court of Common Pleas of Allegheny County found, based on the facts of this case, that Cherlyn Clark's claim was barred by the statute of limitations and dismissed her Complaint. Cherlyn Clark's subsequent appeal to the Superior Court was denied. Cherlyn Clark's subsequent Application for

Permission to file an Application for Remand was denied. Cherlyn Clark's subsequent Application for Reargument was denied. The Supreme Court of the Commonwealth of Pennsylvania denied her Application for Permission to File an Appeal.

REASONS FOR DENYING THE PETITION

This Respondent is one of the few people caught between a prior statute of limitations and an expanded statute of longer duration. Therefore, a review of this case is of little importance to most.

The Superior Court of the Commonwealth of Pennsylvania found that Gene Jeter was entitled to have the action against him brought to a conclusion. Although the court did address the issue of retroactivity of Pennsylvania's eighteen-year statute, that inquiry was

not determinative. Cherlyn Clark's action was time-barred in any event. Her complaint for support was dismissed on July 8, 1985 . . . some eight months prior to the effective date of the eighteen-year statute of limitations. It would, therefore, seem that Petitioner's brush sweeps too braodly in requesting Certiorari. Limited to the facts and circumstances of the instant matter, any decision would be of little, if any, precedential value.

Petitioner's reliance upon the position of the Department of Health and Human Services is misplaced. The comment cited relates solely to the mechanism of the establishment of paternity and not to actions already time-barred or judicially concluded. See, Child Support Enforcement Program, Implementation

of Child Enforcement Amendments of 1984, 50 Fed. Reg. 90, 19608, 19631 (1985), comment to 45 C.F.R. Section 302.70(a)(5). Indeed, if any legislature or court would seek to impose an expanded statute of limitations upon a defendant who had successfully raised the bar of time, there would necessarily be a constitutional inquiry. The priviledge to raise a statute of limitation is a vested right constitutionally protected by the Fourteenth Amendment to the Federal Constitution. ELECTRICAL WORKERS V. ROBBINS AND MYERS, INC., 429 U.S. 229 (1976); CHASE SECURITIES CORP. V. DONALDSON, 325 U.S. 304 (1945); CAMPBELL V. HOLT, 115 U.S. 620 (1885). Petitioner would have This Court revisit the constitutional arguments continually raised for the last nineteen years in

these statute of limitation cases. Yet, the Commonwealth of Pennsylvania has met these arguments with contempative consideration. ASTEMBORSKI V. SUSMARSKI, 502 Pa. 409, 466 A.2d 1018 (1983); PETRI V. SMITH, 307 Pa. Super. 261, 453 A.2d 342 (1982); VON COLLN V. PENNSYLVANIA RAILROAD CO., 367 Pa. 232, 80 A. 2d 83 (1951). It would now serve no purpose to require that we examine the constitutionality of a defunct and repealed statute.

The thing is done. It was a political question which required a legislative response. The Congress of the United States spoke; and, the Pennsylvania Legislature responded. It is over. Let the matter rest.

CONCLUSION

For these reasons, Respondent respectfully requests that Petitioner's prayer for a Writ of Certiorari be denied.

Respectfully submitted,

Wendell G. Freeland

Wendell G. Freeland, Counsel for RESPONDENT

Craig R. McClean, Additional Counsel.

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